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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE JAMES DONATO, JUDGE

IN RE: GOOGLE PLAY STORE)
ANTITRUST LITIGATION.) No. 21-md-2981-JD
)

San Francisco, California

Thursday, September 9, 2021

TRANSCRIPT OF PROCEEDINGS

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(Appearances continued, next page)

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Thursday - September 9, 2021

11:10 a.m.

P R O C E E D I N G S

THE COURTROOM DEPUTY: Calling Civil Multi-district Litigation 21-2981, In Re Google Play Store antitrust litigation.

Counsel for the plaintiffs, please -- oh, the court reporter is here. I don't see her name. Do you?

THE COURT: No. Listen, everyone, I was just going to record this because this is taking too long, but let me see if I can find Belle.

THE COURTROOM DEPUTY: No, if you're raising your hand I don't see you, Belle.

I'm just going to record it, Judge, because --

THE COURT: That's fine, okay. Go ahead.

THE COURTROOM DEPUTY: Okay, counsel, let me announce the case, call the case again. Calling Multi-district Litigation 21-2981, In Re Google Play Store Antitrust Litigation.

Counsel for the plaintiff? Please state your appearances.

MR. BORNSTEIN: Good morning, Your Honor. Gary Bornstein for plaintiff Epic Games.

MS. NAM: Good morning, Your Honor. Hae Sung Nam, Kaplan Fox, for the consumer plaintiffs.

MS. GIULIANELLI: Good morning. Karma Giulianelli from Bartlit Beck for the consumer plaintiff as well.

1 **MS. SWEENEY:** Good morning, Your Honor. Bonny
2 Sweeney from Hausfeld for the developer plaintiff class.

3 **MR. KELLY:** Good morning, Your honor. Eamon Kelly
4 from Sperling & Slater, also for the developer plaintiff
5 class.

6 **MR. HARRINGTON:** Good morning, Your Honor. Ben
7 Harrington of Hagens, Berman also for the developer plaintiff
8 class.

9 **MS. BLIZZARD:** Good morning, Your Honor. Paula
10 Blizzard for the State of California. And if I may introduce
11 my colleagues here today as well.

12 I have David Sonnenreich from Utah, who's been
13 instrumental in bringing this case. But to clarify, myself and
14 Mr. Sonnenreich are here largely for residual and historical
15 purposes. Because I'm very pleased to announce that our lead
16 counsel, going forward, is Mr. Brendan Glackin. He's been
17 appointed a Special Assistant Attorney General for the State of
18 Utah, and will be lead counsel and will be speaking for the
19 states almost exclusively going forward.

20 **THE COURT:** Good morning.

21 **MR. GLACKIN:** Good morning, Your Honor.

22 **THE COURT:** Good morning. Okay. Is that it for
23 plaintiffs?

24 **THE COURTROOM DEPUTY:** Counsel for defendants?

25 **MR. ROCCA:** Thank you, Ms. Clark.

1 Hello, Your Honor. It's Brian Rocca of Morgan Lewis,
2 representing Google.

3 **MR. SIMMONS:** Good morning, Your Honor. Ian Simmons
4 of O'Melveny & Myers, for defendants.

5 **THE COURT:** Is that it for the defense team here
6 today, Mr. Rocca?

7 **MR. ROCCA:** Yes, Your Honor.

8 **THE COURT:** All right. Scheduling check-in.

9 Let me tell you what I'm thinking, and it should all be
10 straightforward. September trial date is fine with me, if
11 that's what you'd like to do. I can't -- I've got a bunch of
12 things stacked up. So the -- the latest I can have you in at
13 that portion of 2022 is going to be the first Tuesday in
14 September. So whenever -- just plan on jury call, day after
15 Labor Day. Unless it's one of those late Labor Days. Then
16 we'll start the week before.

17 And then in terms of working -- because that's the trial
18 date. In terms of working backward to now, I want you all to
19 get together, and pull up from my *Capacitors* antitrust MDL
20 case. It's going to be the initial case. Here's the case
21 number -- I'll put this in the minutes so you don't have to
22 kill yourself writing it down, but it's going to be 14-3264.
23 Pull up Docket No. 1405.

24 That is the scheduling order that I want you to follow in
25 terms of pacing. It's going to have a lot of things that

1 aren't relevant to you, since they were are all overseas
2 defendants, so there are all sorts of dates for the FTAIA.
3 Don't worry about that.

4 But it sets out how I would like to pace class
5 certification, fact discovery, merits, merits experts, summary
6 judgment and so on. So use that as your template. Get
7 together, and propose dates, based on that template.

8 And, I know we're still having an ongoing dialogue about
9 what the trials are going to look like. I need to know sooner
10 rather than later about how you want to do it, for me to think
11 about. So I would like, by mid-January at the latest, to get a
12 proposed trial plan.

13 Now, by that, I mean jury trial will go first. I've
14 already articulated how that's going to play out with any
15 equitable issues, liability and damages. I'm not -- I'm open
16 to the all suggestions. I'm not guaranteeing anything. I'll
17 tell you, I'm a little bit queasy at the idea of splitting up
18 liability and damages. I never do it. I don't like it. I
19 think it creates problems.

20 But it may be that, given this case, this is a unique
21 situation, and that's the way we have to do it. So I'm happy
22 to consider it. But just think it through. Okay?

23 And the goal -- and I know you all embrace this -- is
24 we're going to be as efficient as possible within the bounds of
25 due process, giving everybody a chance to make their case. But

1 not in a duplicative or wasteful way. You don't want that any
2 more than I do. You certainly don't want to take up too much
3 time with the jury. I should say take up all the time with the
4 jury we need, but we don't want to take it up wastefully.
5 That's our guideline.

6 So work all that out. I'm confident you can do it. And
7 I'll set a date in the minutes, maybe, you know, somewhere
8 around the middle of the month of January for the joint plan.
9 And how about, how about two weeks to get the -- oh, just let
10 me confirm.

11 So Mr. Rocca, there will be no motion to dismiss -- is
12 that right -- for any of the complaints?

13 **MR. ROCCA:** That's right, Your Honor. We submitted
14 to the Court yesterday a proposed stipulation with the
15 coordinated date for responsive pleadings. And we appreciate
16 Your Honor's consideration of that stipulation.

17 **THE COURT:** Perfectly fine. Just build that into
18 your -- whatever date you want is fine. Just bank on it. But
19 build it into your schedule so we have a good written record.

20 How about two weeks, say, about two weeks from today for
21 you to submit the proposed joint case management schedule,
22 based on that exemplar that I gave you from my other case.

23 Does that sound okay, defendants?

24 **MR. ROCCA:** It does, Your Honor. Thank you.

25 **THE COURT:** Plaintiffs, are you okay with that?

1 Anybody have a problem with that? No?

2 (No response)

3 **THE COURT:** All right. Well, I think we accomplished
4 what I wanted to do.

5 I will ask about -- somebody flagged a state -- a
6 collection of documents that the states have. And I guess
7 there's some dispute about whether those are going to be
8 produced wholesale to the non-state plaintiffs. Is that right?

9 Who wants to --

10 **MR. ROCCA:** Yes, Your Honor.

11 **MR. BORNSTEIN:** Yes, Your Honor.

12 **MR. ROCCA:** Go ahead, Your Honor. Whoever you want
13 to hear from first.

14 **THE COURT:** Well, Mr. Bornstein, you asked. Didn't
15 you ask about it?

16 **MR. BORNSTEIN:** We did, Your Honor, on behalf of all
17 of the private plaintiffs here. But I'll take the mic in the
18 first instance, if I could.

19 The issue here is we served an RFP way back in November or
20 so, asking for the documents that Google had produced in
21 various investigations. We had asked for Google to identify
22 for us the investigations that related to the issues in this
23 case. Setting aside --

24 **THE COURT:** I remember one from the, sort of, House
25 committee.

1 **MR. BORNSTEIN:** That's correct.

2 **THE COURT:** We worked that one out, right?

3 **MR. BORNSTEIN:** We did, we did.

4 **THE COURT:** Okay.

5 **MR. BORNSTEIN:** But Google did not, in its
6 interrogatory response or its discussions with us, identify
7 any investigation having been conducted or in the process of
8 being conducted by the states.

9 So we then received as Your Honor did in July, the
10 complaint from the states, which obviously relates to the
11 issues that are in play in the Epic case and in both of the
12 class cases. And that complaint had in it a number of
13 documents that we had never seen that had not been produced in
14 our cases.

15 And it is evident from our subsequent discussions with
16 Google that there is a very large number of documents that were
17 produced in response to the states' investigation relating to
18 these issues about which we had no knowledge, and was not
19 mentioned in --

20 **THE COURT:** Let me pause on that. So somebody -- may
21 have been you, may have been Google -- said it's millions and
22 millions of pages. Is that right?

23 **MR. BORNSTEIN:** That's, I think, what's been
24 represented to us. I obviously don't know for sure. We've
25 not asked for all of it to be produced to us. We've asked for

1 a targeted set of the materials that are relevant to this
2 case. And not --

3 **THE COURT:** Give me some top-line examples of that.
4 I'm not tying your hands, but what is it you want from the
5 state documents?

6 **MR. BORNSTEIN:** Sure, Your Honor. So if there are
7 documents that relate to Android app distribution and to the
8 Google Play Store, those are things that we want.

9 We don't want documents that are solely about search,
10 documents that are solely about advertising. Those are not
11 documents we're looking for, and they're not documents we asked
12 for in our RFPs, by and large.

13 So what we're --

14 **THE COURT:** Now, what -- are you asking your
15 colleagues at the states to just turn these over to you? Or
16 are you asking Google to turn them over to you?

17 **MR. BORNSTEIN:** Well, we're asking Google to do it,
18 Your Honor. I don't think the states could go ahead and do it
19 without Google's permission, as I understand the state of
20 play, and various confidentiality restrictions and so forth.
21 So while I might want the states to do that, I don't think
22 that is the proper path. I think we need to go through
23 Google. And that's what we've -- we've tried to do.

24 **THE COURT:** Well, if you served RFPs on Google,
25 what's the problem?

1 **MR. BORNSTEIN:** Google has refused to produce in
2 response to those RFPs, Your Honor. Google did not tell us
3 that this investigation existed, and did not produce the
4 documents that were produced to the states.

5 We have been asking, since the states filed their
6 complaint and we discovered these documents that had not
7 previously been given to us, we've been asking Google to
8 produce them. We didn't really get any substantive answer or
9 any proposal for about two months, until the joint statement
10 for this --

11 **THE COURT:** Well, here's what I'm not understanding.
12 I mean, you're not asking -- you don't have an RFP to the
13 effect of: Give us everything you gave the states. Right? I
14 mean, you didn't say that.

15 **MR. BORNSTEIN:** We do, Your Honor. We do have that
16 RFP. It's No. 2.

17 **THE COURT:** But you have the substantive RFP saying
18 any documents related to -- what was it? Android Play Store?

19 **MR. BORNSTEIN:** Well, we have a number of substantive
20 RFPs as well, Your Honor. But we do have an RFP asking
21 specifically for the documents that were produced in response
22 to any investigation on these issues. That was the RFP
23 pursuant to which we ultimately addressed --

24 **THE COURT:** Here's what I'm trying to get at in a
25 rather ham-fisted way. If you ask all of these individual

1 inquiries specific to Android and Play Store, you're going to
2 capture everything relevant in the state documents anyway.
3 Right?

4 **MR. BORNSTEIN:** I don't think so.

5 **THE COURT:** What are you going to miss?

6 **MR. BORNSTEIN:** I don't think that's right,
7 Your Honor, for the following reason. Number one, we didn't
8 get -- we didn't get everything that's been produced so far.

9 Second, there are custodians from whose documents there
10 were productions to the states that are not custodians in our
11 RFPs. There is a date range that's at issue that's outside of
12 our date range.

13 And I guess the other thing, Your Honor, is --

14 **THE COURT:** Before we get to that, just to jump in,
15 you may have substantive requests that are beyond the
16 custodians you've agreed to, and outside the date range of
17 materials produced. So that's why you wouldn't have
18 (Inaudible) at the state level.

19 **MR. BORNSTEIN:** That's correct, Your Honor. And we
20 are going to be litigating, I hope, you know, arm in quite
21 cooperatively with the state plaintiffs, and they're going to
22 have access to documents we don't have access to that are
23 relevant. We have a coordination order that the Court has
24 entered.

25 I think it just makes sense for us to have access to the

1 same documents, as to which there can be no privilege issue and
2 no burden issue in turning them over.

3 **THE COURT:** All right. Well, Mr. Rocca, it seems
4 like something that can be worked out.

5 **MR. ROCCA:** Absolutely, Your Honor. And I'm pleased
6 to report, there's common ground here. That's precisely what
7 we suggested yesterday. Google is willing, consistent with
8 the Court's prior guidance, in the House Judiciary Committee,
9 to produce relevant documents that are included in these
10 repositories we've identified related to Google Play and
11 related to Android app distribution. And we laid out how, how
12 we were planning on doing that.

13 We are fully committed to getting the plaintiffs the
14 relevant documents they need. We're ready to start that
15 process. And we -- and I think, I think -- I'm pleased to hear
16 Mr. Bornstein's perspective on it. And I think there's common
17 ground; we're ready to go.

18 **THE COURT:** So there's no problem, then? What I'm
19 hearing? We're all good?

20 **MR. BORNSTEIN:** I would respectfully disagree with
21 that, Your Honor. We did finally, yesterday, get another
22 proposal on the eve before this conference. But that proposal
23 now, you know, two months in, is that they will produce from
24 some unspecified set of custodians in response to two CIDs
25 that they have received from the state that they won't share

1 with us, without telling us what the other CIDs are, without
2 telling us which custodians they won't produce from.

3 It's a very inchoate at this point proposal that leaves a
4 lot of discretion to Google to narrow the scope of the
5 documents that we'll receive, and gives them the opportunity
6 then to prevent us from, you know, using all the same documents
7 that the states have. Unless, I suppose, the states were to go
8 to Google and say, you know: We want to use this document at
9 deposition, and, you know, now you know that we're going to use
10 this document, it's going to be extraordinarily cumbersome and
11 unfair for the plaintiffs' side.

12 **THE COURT:** All right. Mr. Rocca, what's the answer
13 to that?

14 **MR. ROCCA:** Your Honor, the answer is clear. I Made
15 it crystal clear yesterday in our meet-and-confer that we were
16 committed to being transparent as to the custodians that we're
17 producing from. And I described that the set of custodians
18 would include those custodians who work in the Google Play
19 Android business unit. Which is broader than the set of
20 custodians we laboriously negotiated in this case.

21 So they're getting more custodians, because those
22 productions to the states in connection with the search
23 investigation which is a separate case, in connection with the
24 Ad Tech investigation -- again, a separate case -- are broader
25 than the MDL custodians.

1 So we're committing to search for documents, using the
2 agreed-upon search terms, from custodians that are in the
3 Android and Google Play business unit, and to produce
4 responsive documents as we've done for all other discovery
5 protocols in this case.

6 **THE COURT:** Let me ask you this. Is that going to
7 capture all the responsive documents produced to the states?

8 **MR. ROCCA:** It is -- um, well, Your Honor, when
9 you're talking about literally millions and millions of pages
10 of documents, I can't -- I can't today tell you that there's
11 not going to be a stray document that --

12 **THE COURT:** Oh, no, I understand.

13 **MR. ROCCA:** Yeah.

14 **THE COURT:** But your colleague is saying there's a
15 whole different cast of people, and maybe different date
16 ranges. So you're telling me that won't be an impediment to
17 the plaintiffs.

18 **MR. ROCCA:** The date ranges are not an issue. We're
19 not going to implement date-range restrictions. We're going
20 to run the same set of search terms that we've run, which we
21 talked with Your Honor a lot before; they're a very lengthy
22 list, a very comprehensive list. We'll run those search terms
23 against custodians in those databases who are connected to the
24 Android and Google Play business unit, which is what this case
25 is about.

1 And obviously, there's a massive amount of irrelevant
2 information in the search context, in the Ad Tech context that
3 that would hopefully not capture. The goal is to find the
4 stuff that is relevant here. Fully committed to doing that.

5 And if the states during the course of the case,
6 Your Honor, have any issues at all and they say, "Hey, you
7 might have missed a category" or "Here's a document," we will
8 get that document into this case so the parties can use it.
9 That's my commitment.

10 **THE COURT:** Okay, thank you.

11 Before we get back to Mr. Bornstein, Ms. Blizzard, I mean,
12 the states are agnostic. They're happy to do anything. Right
13 you're not going to -- there's no independent reason why the
14 states would want to fold on any of that, is there?

15 **MR. SONNENREICH:** Your Honor, to address that issue,
16 I --

17 **THE COURT:** Oh, okay.

18 **MR. SONNENREICH:** Yes. Basically that's true, but
19 with certain exceptions. The main exception is this.

20 We were not a party to nor should we be a party to the
21 negotiation over search terms and custodians. We were given
22 documents and a response by Google, which I won't get into
23 unless we need to. And we believe we're entitled to use any
24 documents in our investigation which did, in fact, focus in
25 part on Play Store in-app billing.

1 **THE COURT:** You mean the states.

2 **MR. SONNENREICH:** Right. The states. In other
3 words, we're not limited by a set of search terms that now are
4 negotiated between the other plaintiffs and Google. Anything
5 in our investigative file that was given to us by Google, we
6 can use in this case.

7 **THE COURT:** Well, I think that's the issue. So the
8 non-state plaintiffs want to catch up. That's what we're
9 talking about.

10 **MR. SONNENREICH:** Right. But in other words,
11 whatever set of documents they and Google agree are the right
12 set of custodians to look at, if we find other documents, we
13 believe we're free to share them with the other plaintiffs and
14 use them in the case. And we can't necessarily give those
15 documents to Google in advance, because we may be using them
16 for impeachment or other purposes. Such as to compare them --

17 **THE COURT:** Let me just jump in.

18 I thought Mr. Bornstein told me that your hands are tied
19 and he couldn't get them from you. Are you saying differently?

20 **MR. SONNENREICH:** That depends. You can certainly
21 order us to provide access. There's no question about that.
22 There's a debate with Google about the degree to which we can
23 use our investigative materials, when and how. But the
24 states' position is that it is unlimited. We have these
25 materials; we've obtained them in the investigation. That it

1 covered these matters; it also covered other matters. Those
2 other materials may not be relevant; we wouldn't use them,
3 therefore.

4 But to the extent --

5 **THE COURT:** Let me jump in.

6 Mr. Rocca, that may be Mr. Sonnenreich -- I mean, he's
7 proposing, you know, they have a state library, so to speak,
8 and he's proposing to give full check-out privileges to the
9 other plaintiffs. That way you don't have to pay any money;
10 you don't have to do anything. It's all right there; it's
11 between the states and the plaintiffs; it's cost-free to
12 Google. Sounds like a pretty good plan.

13 What do you think about that?

14 **MR. ROCCA:** Your Honor, that plan would mean that all
15 of the plaintiffs in this case would have access to literally
16 millions of pages of documents that are completely irrelevant,
17 that relate to matters that are -- that are being handled in a
18 separate MDL in New York, that are being handled in a
19 litigation in D.C.

20 We should be producing relevant documents, which is
21 precisely what Mr. Bornstein asked a moment ago, which is what
22 the meet-and-confer position has been throughout, and which is
23 what Your Honor ordered in connection with the House Judiciary
24 report.

25 So all we're asking to do is to let us produce responsive

1 documents. We are absolutely committed to working with
2 Mr. Sonnenreich and Mr. Glackin, his new colleague, and
3 producing anything in this case that gets lost in the shuffle.
4 In big document productions, that may happen.

5 But, bottom line is we want to produce relevant documents.
6 And we want to get that process going. Same search terms. We
7 won't limit it to date ranges. And we'll look at the
8 custodians that relate to Android and Google Play. Perfectly
9 reasonable position.

10 And it doesn't seem right to just say: Well, Google is
11 going to produce -- or the states will make available a massive
12 investigatory file that relates to Google Search and
13 advertising technology.

14 **THE COURT:** Well, how about that, Mr. Sonnenreich?
15 Can you wall off -- I don't know, I guess, I'm not sure what
16 the other cases are -- maybe the ad placement litigation or
17 the other -- can you wall that off, and just stick to Play
18 Store?

19 **MR. SONNENREICH:** Here's the problem, Your Honor,
20 with that. First of all, we're not necessarily suggesting
21 that we have to give access to the entire database to all the
22 plaintiffs.

23 What we're saying is should Google turn over a set of
24 documents, based on an agreement with other plaintiffs as to
25 custodians and search terms, and should we find other documents

1 in our database that didn't get turned over, we don't -- we
2 believe we are free to use those documents. They are in our
3 files right now. And if we were the only litigants, we
4 wouldn't have any issue. Not that we would turn over the key
5 to the database to everybody, although we could do that. It
6 would certainly simplify things.

7 To clarify what happened here, though, and why this is the
8 position the states are taking -- Mr. Rocca, do you have an
9 objection if I read one of the requests from our CID and sort
10 of the response to that request?

11 **MR. ROCCA:** Well, I don't know what you're going
12 read, David, and I feel uncomfortable. I mean, state law
13 protects what you're about to read, is my understanding.

14 What I think you're going to say -- well, I don't know
15 what your main point is. But I thought you were going to say
16 that Google produced documents, like you normally do --

17 **THE COURT:** Let me just jump in.

18 I think you all need another week to talk about this.
19 Okay? I've been sensitized to the issues. I want you all to
20 get together, just spend one more week. Mr. Sonnenreich, you
21 need to be at the table --

22 **MR. SONNENREICH:** Of course.

23 **THE COURT:** -- if you're going to be the state
24 representative. My preference would be for you to work
25 something out, as always. If you don't, the old judge is

1 going to come in with a buzzsaw. So that's just the way it
2 goes. So try to work it out.

3 And it seems to me that the path of least resistance is
4 making portions of the documents in the state possession --
5 states' possession available. That way, Google doesn't have to
6 pay for anything, and you don't have to put all that time in
7 reviewing it, I don't have to hear about mystery custodians and
8 date ranges and everything else.

9 If you can't do it, that's fine. We'll work it out.
10 That'll just be a little bit more cumbersome.

11 But how about another week? Is that going to be enough
12 time, Mr. Bornstein, to get together with everybody?

13 **MR. BORNSTEIN:** Your Honor said one week? I think
14 that should be fine. Yes.

15 **THE COURT:** Mr. Sonnenreich, are you okay with that?

16 **MR. SONNENREICH:** I would ask for the following
17 Monday.

18 **THE COURT:** You mean this coming Monday?

19 **MR. SONNENREICH:** No, a week from, Your Honor.

20 **THE COURT:** Oh, all right. So just a week from the
21 coming -- okay, that's fine. Mr. Rocca, are you okay with
22 that?

23 **MR. ROCCA:** Yeah. Your Honor has set a deadline for
24 the case schedule. How about on the same day, we just submit
25 a separate --

1 **THE COURT:** Oh, I think this is a separate issue. I
2 don't want to wait that long.

3 **MR. ROCCA:** Very well, Your Honor.

4 **THE COURT:** So just get -- you know, every day of
5 discovery delay is a day someone's going to come back to me
6 and say we can't go to trial. And I don't want to do that.
7 So this is an imminently solvable issue.

8 So a week from Monday -- you can beat the deadline.
9 That's just an outer boundary. You can always beat the
10 deadlines. But a week from Monday, send me a discovery letter.
11 If everything's good, you don't have to send me anything.
12 That's fine. Silence I will interpret as you've reached a
13 solution.

14 If you haven't, just send me a letter. And please, if you
15 do send me a letter, just give me a specific proposal. All
16 right? I mean, really down to the details. "We want..." If
17 you can't reach a deal and you want to go through Google, for
18 example, I want to know who exactly, what custodians, what date
19 range. You know, what searches do you want to run and you've
20 already asked. Not -- not -- not -- you know, just by request
21 number or something. Maybe, maybe that might be too much.

22 And then if you have reached a deal with the state -- or
23 you want to go through the states and you can't decide, you
24 know, send a proposal on how you're going to make the state
25 side work. I mean, you know, millions and millions of

1 documents is not going to be good for anybody. And if they're
2 all off point -- I understand what Google's saying; there's not
3 no need to disgorge all that. So you should be able to work
4 something out.

5 **MR. BORNSTEIN:** Your Honor, we will endeavor to do
6 that.

7 I'll just flag one of the issues is we don't know who the
8 custodians are who are included in the production to the
9 states. We've asked for that information. We haven't gotten
10 a --

11 **THE COURT:** I thought Mr. Rocca told you who they
12 were. Is that not right?

13 **MR. BORNSTEIN:** He has not.

14 **THE COURT:** Oh. Mr. Rocca, I thought -- maybe I
15 misunderstood you. I thought you said you proposed the
16 custodians.

17 **MR. ROCCA:** Your Honor, I proposed the categorization
18 of Android and Google Play, and committed on our
19 meet-and-confer yesterday that we would be fully transparent
20 in identifying who those custodians, are and what search terms
21 we would run, which, we agreed to run all search terms.

22 So let's -- we'll meet and confer about it and update the
23 Court.

24 **THE COURT:** So to my ear, that means you will hear
25 the names, Mr. Bornstein. I don't know if that -- I mean --

1 **MR. BORNSTEIN:** Well, we'll --

2 **THE COURT:** I don't know if knowing the names is
3 going to help you that much, but you'll at least know who they
4 are.

5 **MR. BORNSTEIN:** Well, we'll know who the ones are
6 that we're getting. We won't know the one who are being
7 excluded. For example, Mr. Rocca continues to say "the
8 business units." We don't know if that means they're going to
9 give us the C-suite of individual who are involved in
10 overseeing this. We don't know who else is going to be
11 excluded who is already a custodian in the state process.

12 **THE COURT:** All right. Those are good questions to
13 discuss in the next week or so.

14 Okay. Is there anything else?

15 Yes?

16 **MR. SONNENREICH:** Your Honor, if I may?

17 **THE COURT:** Yes, please.

18 **MR. SONNENREICH:** And that is that we may not --
19 sorry.

20 **THE COURT:** Please. Yeah.

21 **MR. SONNENREICH:** Thank you. As a practical matter,
22 if I may, we may not make much progress if we can't share our
23 CIDs with counsel and the responses Google made to the CIDs.
24 Because it's hard to start a discussion about what did the
25 states get without knowing what the states asked for.

1 **THE COURT:** How about this. This is all off the
2 record; it's all between friends. You can put it under the
3 protective order, if you want. You know, the discussion. How
4 about that?

5 But Mr. Sonnenreich, you just want to share, like, a
6 handful of exemplars. Right?

7 **MR. SONNENREICH:** I want to tell them what we asked
8 for and how Google responded, so they can see what set of
9 documents Google said might be responsive.

10 **THE COURT:** All right. Well, Mr. Rocca, any problem
11 with that?

12 **MR. ROCCA:** Well, we're agreeing to provide relevant
13 documents. And I don't -- the CID doesn't define what's
14 responsive in this case. I don't know what that exercise --
15 it's not going to match up. We run -- we're going to run the
16 search terms that we agreed to in this case against the entire
17 database.

18 I mean, of course, we'll do what the Court directs. I
19 just don't see why all of the requests about search and Ad Tech
20 and -- that that gets us anywhere, other than --

21 **THE COURT:** Listen. Mr. Sonnenreich, you can cut out
22 the Ad Tech and search term, right?

23 **MR. SONNENREICH:** I just want to be able to share the
24 requests that I think may be relevant to this case with the
25 other counsel, and the responses Google gave us --

1 **THE COURT:** Yes.

2 **MR. SONNENREICH:** -- to those requests so they know
3 the universe that they said that the documents were that were
4 responsive among those we have.

5 **THE COURT:** Let's just set that as a benchmark. It's
6 not going to be every CID ever asked of Google. Just be the
7 ones that the states make a first cut in their good judgment
8 about what may be relevant.

9 And you all can look at them and, you know, if you want to
10 put that discussion under some confidentiality agreement,
11 that's fine. This is all discovery, so you're outside the
12 compelling circumstances test, as you know.

13 Okay. Anything else for today?

14 Mr. Sonnenreich, I'll just leave it up to you to work with
15 your colleagues on how to share all that.

16 Okay, someone else was saying something. Ms. Giulianelli?

17 **MS. GIULIANELLI:** Yes, Your Honor, we do have
18 something.

19 We think that we have a dispute that is now ripe, and we
20 wanted to let Your Honor know that we will be submitting in the
21 next couple of days we believe, a discovery letter per the
22 protocol. It relates to source code.

23 We've had many meet-and-confers with Google, and we were
24 not able to put it in the joint case-management statement
25 because on Friday after we submitted it, we got a letter from

1 Google in response to a couple of other letters that we sent
2 about the source code and why we need certain targeted areas,
3 making clear that we are, I believe, in fact at an impasse on
4 this issue.

5 So we're happy to tell you a little bit about it, but we
6 are willing -- you know, we're ready to submit a letter for
7 the --

8 **THE COURT:** Tell you what. Just - I will regret
9 this, but just very briefly, just give me some indication of
10 what the issue is. And then I'll wait on your letters before
11 deciding.

12 Go ahead, Ms. Giulianelli.

13 **MS. GIULIANELLI:** Sure. So the issue is we have
14 certain very targeted categories of source code that we need
15 that relate to things such as Google's process for identifying
16 potentially harmful acts, or the in-app purchase, you know,
17 the in-app purchase software.

18 And --

19 **THE COURT:** You need --

20 **MS. GIULIANELLI:** We need the source code to see how
21 Google is implementing certain security procedures, to see,
22 one, whether it's erecting technological barriers that are
23 unnecessarily restrictive. One thing that we need to show as
24 part of the rule of reason. And you know, the
25 unnecessarily-blocked competing applications in stores, such

1 as some of the allegations that we have in the complaint, like
2 its behavior with Amazon and sideloading and others.

3 So we have asked Google for the last couple of months for
4 some targeted areas of source code that we need -- our
5 technical expert has identified that we need. We've provided a
6 couple of letters explaining in detail for each category why we
7 believe it is relevant and, and we need it.

8 I think Google disagrees. That's been clear on the
9 meet-and-confers. And, and Google also has raised issues
10 about, you know, the sensitivity of the code.

11 So we would like both to -- to get some resolution on the
12 need for the code, the fact that it's relevant, and then a
13 potential way to deal with a protective order targeted, because
14 we believe that Google --

15 **THE COURT:** Well, I have an idea for that. I'll tell
16 you what I've done with source code in other cases.

17 Before I do that, are you talking about a handful of
18 lines? Or thousands of lines? Or millions of lines?

19 **MS. GIULIANELLI:** Your Honor, I can't say how many
20 lines at the moment. But we're talking about a -- it'll be
21 more than a handful of lines. Probably less than millions.
22 But we will give you exactly what we're talking about in
23 detail. We've identified the categories of code that we want.

24 **THE COURT:** I mean, you know, the smaller the number
25 of lines, I think the better we'll be.

1 I understand what you're asking. This seems like, you
2 know, a couple of depositions and some other discovery might be
3 enough, but I don't know. But I'm not going to say no at this
4 point. Not saying yes, either.

5 But before you send me your letters -- did you already
6 send them?

7 **MS. GIULIANELLI:** No. We just wanted to notify
8 Your Honor that --

9 **THE COURT:** Here's an idea. Before you send the
10 letters, here is an idea. And I've done this successfully in
11 other cases. Source code can be sensitive to a (Inaudible)
12 platform like Google and all the dangers in the cyber world
13 these days.

14 You could have, you know, one expert go in and review the
15 source code, you know, at a Google-secure facility. No copies
16 made, no downloads, made but just review the source code and,
17 you know, base an opinion on that. It should be relatively --
18 you know, I say this glibly, slightly, but it should be
19 relatively easy for a computer scientist to look at the source
20 code and conclude whatever it is, you know, you want to test.

21 So you could just, you know, set up a terminal somewhere
22 in a secure facility. Nothing goes in, nothing goes out,
23 source code's reviewed. That's only going to work if it's a
24 reasonable amount. It should be a reasonable amount. Source
25 code -- this is not a trade secrets or copyright case, so it

1 shouldn't be that much.

2 So that's -- before you do that, maybe just talk about
3 that, as a potential compromise, okay? And then if that
4 doesn't solve all your problems you can send me a letter. How
5 about that?

6 **MS. GIULIANELLI:** Thank you, Your Honor. We'll
7 confer with our experts. And we appreciate the guidance.

8 **THE COURT:** Is that okay, Mr. Rocca, as a discussion
9 point?

10 **MR. ROCCA:** Indeed, Your Honor. Thank you for the
11 guidance.

12 **THE COURT:** Okay, all right. Last call for today.
13 Anything else?

14 (No response)

15 **THE COURT:** No. Good. Okay. And, I guess we'll
16 just plan on our regularly-scheduled meeting. And if anything
17 changes, you can just let me know. Otherwise, I'll see you in
18 about four weeks.

19 **MR. BORNSTEIN:** Thank Your Honor.

20 **MR. ROCCA:** Thank Your Honor.

21 **THE COURT:** Okay.

22 **MR. GLACKIN:** Thank Your Honor.

23 (Proceedings concluded)

24

25

CERTIFICATE OF REPORTER

I, BELLE BALL, Official Reporter for the United States Court, Northern District of California, hereby certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.



/s/ Belle Ball

Belle Ball, CSR 8785, CRR, RDR

Sunday, September 12, 2021